

1986

State of Utah v. Anastacio Fernandez, Jr. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

: 860338

Plaintiff-Respondent, : Case No. 860338

:

ANASTACIO FERNANDEZ,

:

Category No. 2

Defendant-Appellant. :

BRIEF OF RESPONDENT
- - - - -

APPEAL FROM CONVICTIONS AND SENTENCES FOR TWO
COUNTS OF RAPE OF A CHILD, A FIRST DEGREE
FELONY, IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR CACHE COUNTY, STATE OF UTAH, THE
HONORABLE VENOY CHRISTOFFERSEN, JUDGE,
PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 860338
-v- :
ANASTACIO FERNANDEZ, : Category No. 2
Defendant-Appellant. :

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STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 860338
- v - :
ANASTACIO FERNANDEZ, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT
- - - - -

STATEMENT OF ISSUES PRESENTED ON APPEAL

Although defendant has raised a number of issues concerning his sentences on two convictions of rape of a child, only the following issue need be addressed by the Court:

1. Has defendant provided the Court with an adequate record on appeal for it to address the issues he raises concerning sentencing?

STATEMENT OF THE CASE

Defendant, Anastacio Fernandez, was charged with two counts of rape of a child, a first degree felony, under UTAH CODE ANN. § 76-5-402.1 (Supp. 1986) (K. 1). After a trial on those charges, a jury found him guilty on both counts (P. 43, 45). The trial court sentenced defendant to the Utah State Prison for two consecutive terms of fifteen years to life, the fifteen years on both terms being mandatory minimum sentences pursuant to § 76-5-402.1(2) (P. 49).

STATEMENT OF FACTS

Although defendant refers in his brief to trial testimony relating to the facts of the crime and his defense of

innocence, no trial transcript has been made a part of the record in this Court. The only documents in the appellate record are the district court record and a transcript of the trial court's pronouncement of sentence. Therefore, the State is unable to set forth any particulars concerning the evidence presented at trial or any evidence presented for purposes of sentencing.

The sentencing transcript indicates that the trial court imposed the fifteen year mandatory minimum sentences after finding that there were no mitigating circumstances to warrant the lesser mandatory sentence of five years and that the following aggravating circumstances supported the greater sentence: (1) defendant's action caused the victim severe psychological harm; (2) defendant displayed sexually-related photographs to the victim during the period in which the offenses occurred; (3) there were a number of instances of misconduct over an extended period of time; (4) defendant used force and threats of force; and (5) the victim was unusually vulnerable (T. 5-6).

SUMMARY OF ARGUMENT

Because defendant has not supported his claims of error with an adequate record on appeal and fails to make citations to the record in accordance with Utah R. App. P. 24(a)(6), this Court should decline to address his challenges to the sentences imposed below.

ARGUMENT

POINT I

DEFENDANT HAS NOT PROVIDED THIS COURT WITH AN ADEQUATE RECORD UPON WHICH IT CAN ADDRESS THE SENTENCING ISSUES HE RAISES ON APPEAL.

The consecutive indeterminate sentences with mandatory minimums of fifteen years that the trial court imposed on defendant were authorized by § 76-5-402.1(2) and UTAH CODE ANN. § 76-3-401 (1978). In accordance with UTAH CODE ANN. § 76-3-201(5)(a) and (d) (Supp. 1986), the court stated on the record the facts supporting and its reasons for imposition of the upper mandatory term. Defendant does not dispute this. Rather, he makes four arguments regarding the mandatory minimum sentences he received: (1) because the highest mandatory minimum term was not statutorily required in this case, the fifteen year sentences on each count were excessive and an abuse of discretion; (2) the imposition of consecutive sentences was excessive and an abuse of discretion; (3) the imposition of consecutive mandatory minimum sentence of fifteen years was a violation of defendant's constitutional right to be free from cruel and unusual punishment; and (4) the trial court violated his right to due process when it considered his plea of not guilty in increasing the sentences.

In that the matter of sentencing rests entirely within the discretion of the trial court so long as the sentence imposed is within the limits prescribed by law, State v. Peterson, 681 P.2d 1210, 1219 (Utah 1984), and since this Court has ruled that Utah's mandatory minimum sentencing scheme for sex crimes does

not violate the cruel and unusual punishment prohibitions of the State and Federal Constitutions, see State v. Bishop, 717 P.2d 261, 268-72 (Utah 1986), defendant must demonstrate, by reference to the record, that the sentences he received were clearly excessive and an abuse of discretion before he is entitled to any relief from this Court. See State v. Gerrard, 584 P.2d 885, 887-88 (Utah 1978) ("[T]his Court will not reverse or modify a sentence prescribed by law unless it is clearly excessive or unless the trial court abused its discretion."). The Court's standard for review of sentences applies equally to decisions on the length of the sentence and whether the sentences imposed will run concurrently or consecutively. See State v. Jolivet, 712 P.2d 843, 844 (Utah 1986). Therefore, to launch any attack on the propriety of his sentences, defendant would have to provide this Court with a complete record on appeal which contained all the documents and proceedings relevant to sentencing. This he has not done.

As noted above, the record on appeal contains only the district court record and a short transcript of the trial court's pronouncement of sentence. Defendant fails to cite to the record to support any of his claims regarding the trial court's allegedly excessive sentences or its alleged consideration of defendant's plea of not guilty in giving him greater sentences. This alone is grounds for affirmance. State v. Olmos, 712 P.2d 287 (Utah 1986); State v. Sutton, 707 P.2d 681, 683 (Utah 1985); Utah R. App. P. 24(a)(6). Furthermore, there appears to be nothing in the record provided to support his claims. It is well

settled that a defendant has "the duty and responsibility of supporting [an assignment of error] by an adequate record [, and absent that record, [the] assignment of error stands as a unilateral allegation which the review court has no power to determine." State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982), cert. denied, 460 U.S. 1044 (1983). See also State v. Theison, 709 P.2d 307, 308-09 (Utah 1985); State v. Jones, 657 P.2d 1263, 1267 (Utah 1982). Finally, the record does not reflect any objection by defendant in the trial court to his sentences on the grounds raised on appeal. This Court has repeatedly stated that, as a general rule, it will not address issues raised for the first time on appeal. State v. Steggell, 660 P.2d 252, 254 (Utah 1983). Defendant offers no compelling reason for the Court to depart from that general rule in this case.

Under the authority cited above, the Court should decline to address the issues raised by defendant and uphold the trial court's sentences.

CONCLUSION

Based upon the foregoing argument, defendant's sentences should be affirmed.

RESPECTFULLY submitted this 14th day of November, 1986.

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DAVID B. THOMPSON
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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and accurate copies of the foregoing Brief to be mailed by first class mail, postage prepaid, to Clint S. Judkins, Attorney for Appellant, 123 East Main Street, Tremonton, Utah 84337, this 14th day of November, 1986.

David B. Thompson